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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

GERALD BERNARD MONTGOMERY,

Defendant and Appellant.

B208897

(Los Angeles County  
Super. Ct. No. MA036388)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Hayden Zacky, Judge. Affirmed.

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L.  
Mar and Susan D. Martynec, Deputy Attorneys General, for Plaintiff and Respondent.

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Gerald Bernard Montgomery was sentenced to four years in state prison following revocation of his probation. On appeal he contends imposition of the upper term based on factual determinations made by the trial judge violated his federal constitutional right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). He also contends the trial court abused its discretion by relying on factors that did not support imposition of the upper term. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Montgomery was charged by information on October 25, 2006 with assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))<sup>1</sup> (count 1), assault with a deadly weapon (a cane) (§ 245, subd. (a)(1)) (count 2), infliction of corporal injury on a spouse or cohabitant (§ 273.5, subd. (a)) (count 3) and misdemeanor battery (§ 243, subd. (e)(1)) (count 4). The information specially alleged Montgomery had served a prison term for a felony within the meaning of section 667.5, subdivision (b).<sup>2</sup>

Appearing in propria persona on November 2, 2006 Montgomery waived his constitutional rights and entered a plea of no contest to count 3, felony infliction of corporal injury on a spouse or cohabitant, pursuant to a negotiated agreement. Before entering his plea Montgomery repeatedly acknowledged his understanding he could be sentenced to state prison for the upper term of four years if he violated probation.

At the December 1, 2006 sentencing hearing the trial court suspended imposition of sentence and placed Montgomery on three years of formal probation, on condition he

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<sup>1</sup> Statutory references are to the Penal Code.

<sup>2</sup> The information also specially alleged as to count 3 Montgomery had suffered two prior convictions for infliction of corporal injury on a spouse or cohabitant within the meaning of section 273.5, subdivision (e). Those allegations were subsequently dismissed on motion of the prosecutor as too remote.

serve 180 days in county jail with credit for time served. The People’s motion to dismiss the remaining counts and special allegation was granted.

On June 6, 2007, after Montgomery admitted having violated the conditions of his probation, the trial court revoked and reinstated probation subject to Montgomery serving an additional 15 days in county jail.

Following a contested revocation hearing on May 9, 2008, at which Montgomery represented himself with the assistance of standby counsel, the trial court again found Montgomery in violation of probation, “by failing to obey all laws in that he has received a minimum of three separate arrests [two for driving under the influence and a third for possession of marijuana].” The court revoked probation and sentenced Montgomery to the upper term in state prison “based on the numerous [probation] violations and the pattern of criminal recidivism [Montgomery] has engaged in.”<sup>3</sup>

### **DISCUSSION**

#### *1. Imposition of the Upper Term Did Not Violate Montgomery’s Federal Constitutional Right to a Jury Trial*

A felony violation of section 273.5, subdivision (a), infliction of corporal injury on a spouse or cohabitant, is punishable by a state prison term of two, three or four years. At the time of Montgomery’s 2006 negotiated plea agreement, section 1170, subdivision (b), provided, when an offense is punishable by one of three statutory terms, “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.”

In *Cunningham, supra*, 549 U.S. 296, the United States Supreme Court held California’s determinate sentencing law violates a defendant’s federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the United States

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<sup>3</sup> The trial court erroneously sentenced Montgomery to an enhanced upper term of five years pursuant to section 273.5, subdivision (e). The court subsequently acknowledged the enhancement allegations had been stricken and resentenced Montgomery to the upper term of four years “based upon all the factors that I indicated at the prior court date.”

Constitution to the extent it authorizes the trial judge to find facts (other than a prior conviction) by a preponderance of the evidence that subject a defendant to the possibility of an upper term sentence. Following *Cunningham* the Legislature amended section 1170, subdivision (b), effective March 30, 2007 as urgency legislation (Stats. 2007, ch. 3, § 3), to eliminate the statutory presumption for the middle term and, instead, to grant the trial court full discretion to impose the upper, middle or lower term. (§ 1170, subd. (b) [“[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court”]; see *People v. Sandoval* (2007) 41 Cal.4th 825, 845.)

Noting that Senate Bill No. 40 (2007-2008 Reg. Sess.), which amended section 1170, subdivision (b), contains no language regarding retroactivity, the California Supreme Court in *Sandoval*, *supra*, 41 Cal.4th 825 avoided deciding whether the amendments to the determinative sentencing law applied to all sentencing proceedings conducted after the effective date of those amendments (see *id.* at p. 845) by “fashion[ing] a constitutional procedure for resentencing in cases in which *Cunningham* requires a reversal of an upper term sentence.” (*Id.* at p. 846.) The *Sandoval* Court held a defendant, not subject to the amended sentencing procedures, is nonetheless properly sentenced or resentenced under a judicially reformed sentencing scheme in which the trial court has full discretion to impose the upper, middle or lower term unconstrained by the requirement that the upper term may not be imposed unless an aggravating circumstances is established. (See *id.* at pp. 845-852; *People v. French* (2008) 43 Cal.4th 36, 45.) “Under [the Supreme Court’s] holding in *Sandoval*, if a defendant is successful in establishing *Cunningham* error on appeal, the trial court is not precluded from imposing the upper term upon remand for resentencing. The defendant is entitled only to be resentenced under a constitutional scheme and is afforded the opportunity to attempt to persuade the trial court to exercise its discretion to impose a lesser sentence.” (*French*, at pp. 45-46.)

In short, by the time Montgomery was sentenced in May 2008 for his 2006 conviction, following the determination he had violated the conditions of his probation,

the trial court was authorized to proceed pursuant to—and Montgomery’s constitutional rights were fully protected by—either amended section 1170, subdivision (b), or the reformed sentencing scheme described in *Sandoval*. Under either version of the governing sentencing law, it was constitutionally permissible for the trial court to impose the upper term for Montgomery’s offense without any additional jury findings. (See, e.g., *People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)<sup>4</sup>

## 2. *The Trial Court Acted Within Its Discretion in Imposing the Upper Term*

In addition to his constitutional challenge to his sentence, Montgomery contends the trial court improperly relied on factors that do not justify imposition of the upper term. The trial court identified two aggravating factors: Montgomery’s numerous prior convictions (Cal. Rules of Court, rule 4.421(b)(2)) and his prior unsatisfactory performance on probation (Cal. Rules of Court, rule 4.420(b)(5)).<sup>5</sup> A single factor in aggravation is sufficient to justify a sentencing choice. (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413.) Recidivism is “a traditional, if not the most traditional, basis for . . . increasing an offender’s sentence.” (*People v. Towne* (2008) 44 Cal.4th 63, 75.)

Notwithstanding the court’s identification of factors in aggravation, Montgomery argues the trial court failed to consider certain mitigating factors favoring imposition of the middle term, including the victim’s request to have the existing restraining order against him terminated, which the trial court granted, and the court’s “initial willingness to grant probation.” Montgomery contends these factors suggest the crime was not a particularly aggravated one. Even if a mitigating factor unquestionably exists, however, the weight or significance to assign it is within the trial court’s broad discretion; the court is free to disregard it altogether and need not explain why it did so. (See *People v. Lai*

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<sup>4</sup> Montgomery acknowledges his constitutional claim has been rejected by recent California Supreme Court decisions but raises the issue to preserve it for further review.

<sup>5</sup> Although the record on appeal does not include a probation report or Montgomery’s criminal history, Montgomery does not contest the truth of the factors upon which the trial court relied.

(2006) 138 Cal.App.4th 1227, 1258.)<sup>6</sup> A sentencing decision ““will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.”” ( *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) No abuse of discretion occurred in this case.

In any event, Montgomery did not object at sentencing to the trial court’s reasons and has forfeited this claim of state law error. (See *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [unless there was a timely objection at the time of sentencing, a reviewing court will not consider “claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices”]; *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511-1512 [by failing to object, appellant forfeited claim upper terms were improper because the trial court did not state on the record its reasons for imposing those terms]; *People v. Zuniga* (1996) 46 Cal.App.4th 81, 84 [finding waiver when counsel had a meaningful opportunity to object to court’s sentencing choice but failed to do so].)

## **DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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<sup>6</sup> Indeed, the trial court need not cite the facts that support its decision and must only set forth its reasons for the term selected, “stat[ing] in simple language the primary factor or factors that support the exercise of discretion,” which the court did in this case. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.406(a); see *Sandoval, supra*, 41 Cal.4th at pp. 846-847.)